U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18May2001

CASE NO.: 2000-LHC-2210

OWCP NO.: 1-148369

IN THE MATTER OF:

BERTRAND L. LEVESQUE
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

APPEARANCES:

Marcia J. Cleveland, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self-Insurer

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearings were held on October 18 and November 28, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX 20A	Attorney Hessert's letter filing the	01/31/01
EX 20	January 15, 2001 report of Dermot N. Killian, M.D.	01/31/01
EX 21A	Attorney Hessert's letter filing the	02/05/01
EX 21	Comprehensive Psychiatric Evaluation of David J. Bourne, M.D., as well as	02/05/01
EX 22 02/05/01	Appendix 1 - - a multi-page listing of the medical records reviewed by Dr. Bourne	
CX 12	Attorney Cleveland's letter requesting an extension of time for the parties to file their post-hearing briefs	03/19/01
ALJ EX 7	This Court's **ORDER** granting such extension	03/19/01
CX 13	Claimant's brief	04/23/01
EX 23	Employer's brief	04/23/01
CX 14	Attorney Cleveland's Fee Petition	04/23/01

The record was closed on April 23, 2001, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on October 15, 1999 in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The claim for compensation is dated November 9, 1999 and the Employer's notice of controversion is dated November 19, 1999. (EX 1, EX 4)

7. The parties attending an informal conference on April 13, 2000.

8. The applicable average weekly wage is $633.21.

9. The Employer has paid no benefits herein under the Longshore Act.

The unresolved issues in this proceeding are:

1. The fact of injury.

2. Whether Claimant's condition is causally related to his maritime employment.

3. If so, the nature and extent of his disability.

4. Entitlement to an award of medical benefits, interest on unpaid compensation benefits, as well as to an attorney's fee and reimbursement of litigation expenses.

Summary of the Evidence

Bertrand L. Levesque ("Claimant" herein), fifty-three (53) years of age, with a tenth grade formal education and a GED while serving in the U.S. Army and stationed at Schofield Barracks in Hawaii, as well as an employment history of manual labor, enlisted in the U.S. Army in May of 1966 and honorably served with the 1st Infantry Division, III Corps, in Vietnam from January of 1967 to January of 1969. He served a total of twelve (12) years on active duty, as well as two (2) years in the active reserves. He went to work on November 6, 1989 as a maintenance electrician at the so-called Hardings Facility of the Bath Iron Works Corporation ("Employer"), a maritime employer that builds and repairs ships and vessels for the U.S. Navy at its Bath, Maine shipyard, as well as at other facilities

in Portland and Brunswick, Maine. He was laid-off due to a lack of work on January 24, 1992 and was rehired on September 21, 1992 in the same job classification and was transferred to work as a production worker at the Bath shipyard in February of 1995 and was assigned duties as a cable puller and, **inter alia**, he "packed transits in the cable run." (CX 6; TR 31-35, 43-58)

Claimant, alleging that he suffers from post-traumatic stress disorder (PTSD) as a result of his Vietnam service, testified that he began to experience shortness of breath in 1995, shortly after being transferred to the shipyard, as a result of exposure to and inhalation of epoxy paint and other chemicals and fumes. He has chronic obstructive pulmonary disease (COPD), chronic chest aches and shallow breathing, Claimant remarking that whenever he gets depressed, his shortness of breath worsens and he experiences panic attacks. He had such an attack when he was taken off the boats and his wages decreased. When he experiences such an attack, he has to go to "a clean area," take his medication to relax him, and he then falls asleep even while on the boats. Claimant's panic attacks were treated by Stephen Fairchild, M.D., and, according to Claimant, he experiences three-to-four such attacks weekly due to the lack of fresh air on the ships and the presence of chemicals in the work area. He experienced no shortness of breath or panic attacks before 1995 and these have worsened over the years due to the paints and other chemicals used in painting the ships. (TR 35-38, 57-60)

In 1995 he took some time off work through the FMLA and he just rested at home in a cleaner environment. He reported these panic attacks to on-duty personnel at "first aid, and first aid laughed" at him. Claimant takes a variety of medication for his various problems and these prescriptions are identified in CX 10, Claimant remarking that he used to take much more medication in the past. (TR 38-42, 61-62)

Claimant last worked at the shipyard on either October 15 or 17, 1999 as Dr. Fairchild suggested that Claimant no longer work on the boats. Claimant was transferred to work in the Hyde Building at the yard and his last day of work at the shipyard was on January 23, 2000. His job involved, **inter alia**, making temporary repairs to the cable. While Claimant experienced shortness of breath and fatigue prior to 1995, he was able to continue working but after 1994 his continued exposure to epoxy paint worsened his COPD, a condition first diagnosed first in 1991. On January 24, 2000 Claimant went to the V.A. Hospital in Togus, Maine seeking medication for his COPD, PTSD and his other problems, and he was hospitalized because the doctors did not want him to drive home as he was on so much medication. Claimant is unable to focus while experiencing a panic attack, is unable to work and must simply rest as much as he can. He

must avoid becoming depressed or stressed out because such will aggravate his COPD, shortness of breath and PTSD. (TR 62-76)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the

burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that an employee's credible complaints of subjective symptoms and pain

can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that working conditions existed which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Bath Iron Works Corp. v. Director, OWCP (Hutchins)**, 244 F.3d 322 (1st Cir. 2001); **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his COPD, shortness of breath and PTSD, resulted from his exposure to and inhalation of epoxy paint and other injurious pulmonary/respiratory stimuli at the Employer's

shipyard. The Employer has introduced substantial countervailing evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest

themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, Claimant relies on the medical progress notes of Dr. Joseph M. Mendes, a family physician, beginning on July 19, 1995 and ending on September 18, 2000, a total of 25 pages. These records reflect that either Dr. Mendes or Dr. Fairchild treated Claimant for his multiple medical problems, including chest congestion, bronchitis, hearing loss, depression, fatigue and dyspnea, shortness of breath and trouble sleeping. (CX 8)

As of October 15, 1999 Dr. Fairchild imposed permanent restrictions against being exposed to fumes and dust because Claimant was unable to “breath when (so) exposed and develops a panic attack.” Dr. Fairchild opined Claimant’s COPD, panic attacks and anxiety disorder were work-related problems. (CX 8)

Claimant has also been evaluated by Dr. Ralph Harder at St. Mary’s Disorders Laboratory and the doctor reported that Claimant’s March 27, 1997 polysomnogram reflected “(s)leep disordered breathing events seen in significant numbers consistent with mild to moderate sleep apnea, hypopnea syndrome” (CX 9) and the doctor, as of October 18, 1997, suggested that Claimant “address his concerns about workplace allergies with Dr. Fairchild.” (CX 9)

The Employer has had actual knowledge of Claimant’s reduced breathing capacity since at least June 14, 1995, at which time he underwent pulmonary function testing at the Employer’s First Aid. The Employer also had actual knowledge of Claimant’s eye problems, hearing loss, shortness of breath, difficulty breathing, depression, fatigue and insomnia since at least that date. (CX 11)

On the other hand, the Employer relies on the Claimant’s treatment records at the Togus Veteran’s Medical Center between November 3, 1999 and October 13, 2000 totaling 120 pages.

Dr. Dermot N. Killian, pulmonary specialist, examined Claimant on January 15, 2001 at the Employer's request and the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and the physical examination, concluded as follows (EX 20) (Emphasis added):

"**IMPRESSION: Hyperventilation syndrome in conjunction with panic attacks. Underlying generalized anxiety disorder. His present medical regiment includes - Clonazepam twice a day. Serzone twice a day. Elavil at night. We are presently reducing his lorazepam because of mild drowsiness.**

"DISCUSSION: This gentleman has a generalized anxiety disorder with panic attacks. The panic attacks include elements of hyperventilation as the dominant symptomatology. He perceives the smell of epoxy as threatening and it precipitates the attack. There is little evidence that his exposure to anything at work has had a lasting pulmonary effect, but the fact that he is still having his anxiety in the face of such an aggressive medical regimen bodes poorly for him being able to return to his occupation at BIW, which would include working onboard ship or indeed, for that matter, at this stage being exposed to any chemicals that could be perceived by him as epoxy paint."

The Employer has also had Claimant evaluated by its psychiatric expert, Dr. David J. Bourne, and the doctor, after reviewing Claimant's voluminous medical records (EX 22), concluded as follows in his Comprehensive Psychiatric Evaluation (EX 21) (Emphasis added):

DIAGNOSIS (DSM-IV):

Axis I: Posttraumatic stress disorder
Panic disorder
Possible depressive disorder NOS, not in evidence at the present time
History of episodic alcohol abuse, rule out alcohol dependence
Possible dementia, mild

Axis II: Diagnosis deferred

Axis III: COPD by verbally reported history and by some records; hyperventilation syndrome with very mild restrictive ventilatory defect per Dr. Killian; sleep disorder; hearing difficulties; mild scoliosis

Axis IV: Stressors: war-related experiences; recent divorce; conflicted relationship with children; reclassification at BIW in 1995

Axis V: GAF (Global Assessment of Functioning) = 45 (serious symptoms)

DISCUSSION AND OPINION:

Bertrand Levesque described symptoms of posttraumatic stress disorder, which, if his history is accurate, clearly relate to his Vietnam experience. He was quite distressed when discussing his military history. Because of the concreteness of his thinking because of his apparent discomfort and because I did not want to risk deterioration of his state of mind, I agreed not to probe beyond his comfort level concerning his military experiences or his PTSD symptoms. I did not perceive him as hostile or manipulative, although he was somewhat controlling. Based on the history which he told me and the documentation in the records from Togus and the Vet Center, I think that it is reasonable to conclude that he does suffer from Vietnam-related posttraumatic stress disorder. **I think that the PTSD is moderate to severe. The PTDS is not caused or aggravated by his employment at Bath Iron Works.** (Emphasis added)

Mr. Levesque also described symptoms of panic disorder. Although he said that the panic disorder began in 1995 and denied panic attacks prior to that date, the medical records document panic disorder beginning in 1990 (**See** Appendix I, #2, page 11, for office notes from Lisbon Family Practice indicating anxiety reaction on 05/07/90 and 10/12/92, and panic disorder with difficulty breathing on 12/29/93; **see** also pages 26-27, for Certificate of Health Care Provider FMLA forms completed by Dr. Fairchild indicating that his depression and anxiety with panic attacks and shortness of breath commenced in 1991). The medical records also document treatment with anti-anxiety medications in 1990 (**see** Appendix I, #2, page 11, for office notes from Lisbon Family Practice indicating prescription of Librium [Chlordiazepoxide] on 05/07/90, prescription of Chlordiazepoxide on 10/12/92, prescription of Xanax [Alprazolam] on 12/29/93). (The Chlordiazepoxide and Xanax are in the same family as his recent medications, Lorazepam [Ativan] and Klonopin [Clonazepam], which are being prescribed for panic disorder.)

Mr. Levesque's symptoms of panic attacks include shortness of breath, racing heart, muscular tension, tremor, lightheadedness, derealization and memory disturbance, a sense that he is dying, tingling in his fingers and toes, confusion, withdrawal, and weakness. Mr. Levesque attributes the panic attacks to having been required to work in closed spaces on board the vessel.

It is possible that Mr. Levesques panic disorder increased in 1995, and that work issues contributed to that increase. It is not likely that the panic disorder was caused by work events

in 1995 for the following reasons: (1) the records indicate treatment for preexisting anxiety and panic disorder, (2) the symptoms of panic disorder and PTSD (both of which are forms of anxiety disorders) overlap, and (3) many of Mr. Levesque's panic attacks have occurred away from the work environment. It is possible that some attacks were caused by discrete work events, but his panic disorder as a whole was not caused by issues at work.

Mr. Levesque's attribution of his panic attacks to events at work is understandable, as people often attribut their panic attacks to events which are transpiring or places where panic attacks occur. This does not mean that the attacks were caused by those events or places. For example, people who become anxious when crossing bridges may develop panic disorder and agoraphobia; the bridge becomes a phobic focus, but is not the cause of the disorder, which is an internal biological and psychological phenomenon. The fact that many of Mr. Levesque's attacks occurred away from the work environment and at night, even in 1995, reflects the lack of causal connection between the work environment and the panic disorder as a whole. **The panic disorder is an ongoing disorder, and could not have been caused by the work issues which have been asserted, if the contemporaneous medical reports from the family physician, prior to 1995, are accurate. I have no reason to dispute the accuracy of those records.** (Emphasis added)

Mr. Levesque asserts that he feels depressed. There is some suicidal ideation but he has never made a suicide attempt. There are cognitive problems, irritability and tearfulness which could be related to depression, to unspecified causes or to PTSD. The cognitive, concentration and memory difficulties appear to be significant and are more severe than I would anticipate from Mr. Levesque's level of depression, which is mild at the present time. It is possible that his general anxiety level and PTSD contribute to his cognitive difficulties, although I think that the difficulties are more severe than would be expected form those causes as well. He continues angry at the loss of status and income which resulted from the takeover by General Dynamics and the change in his job assignment.

To answer the specific questions in the referral letter, I do believe that Mr. Levesque suffered from a preexisting psychological condition which predated his employment at Bath Iron Works. His prior condition was posttraumatic stress disorder, although that was not diagnosed until much more recently. He also had a significant level of generalized anxiety and panic attacks which became manifest while he was employed at BIW but well before 1995.

I am unaware of any aggravation of Mr. Levesque's emotional problems, as they related to the workplace on October 15, 1999. Mr. Levesque's condition at that time, while peripherally related to work, was not caused by the work environment. There may have been occasions, over the years, in which some of Mr. Levesque's panic attacks were related to stressful environments at work, such as when working while exposed to epoxy fumes or when pulling cable through a confined area, but his overall psychiatric condition, including the panic disorder, was not a work-related condition. I am not aware of anything psychiatrically different on October 15, 1999. There were other major stressful events in Mr. Levesque's life at the time, such as his divorce, problems with his children, and the illness of family members. His younger brother, with whom he was close, died in December 1999, shortly before Mr. Levesque's departure from work. Mr. Levesque experienced a significant grief response to his brother's death. **At the present time, I do not think that his panic disorder is caused or related to his employment at BIW.** (Emphasis added)

The similarity between Mr. Levesque's respiratory distress and the shortness of breath inherent in panic attacks is quite clear. Panic disorder often causes shortness of breath, air hunger and hyperventilation. Mr. Levesque's anxiety level seems to provoke episodes of shortness of breath. I believe that this is consistent with the findings of Dr. Killian.

Mr. Levesque is considerably psychologically distressed. He suffers from posttraumatic stress disorder, which, according to his description, is very distressing and which the Veterans Administration considers fifty percent disabling. **His panic attacks are episodic and, while problematical, should not prevent him from working in most environments. I cannot explain the severity of his concentration or memory problems, but those appear to be significant by his and his fiancee's description and merit further evaluation.** I would consider a neuropsychological work-up and a possible work-up for organic brain dysfunction including brain imaging studies and blood tests such as thyroid, folate and B-12 levels. Although I think that returning to a work environment could be psychologically strengthening, I would recommend doing so only gradually. I would recommend a supportive environment, work part-time initially, and a gradual resumption of a full-time schedule. I would not recommend returning to work on board a vessel, because of his perception that this has caused his problems. I think that it is primarily Mr. Levesque's posttraumatic stress disorder which impairs him, and which is most likely to keep him from being able to return to work successfully, although the panic disorder and other psychological symptoms also play a role. At the present time, I am not diagnosing ongoing alcohol abuse, although there is a history of past alcohol abuse and

suggestion of more recent intermittent alcohol abuse problems. I am dependent on the history which he and Ms. Steinmeyer have given concerning this issue. Alcohol abuse, if severe, can cause or contribute to cognitive problems such as those which he and Ms. Steinmeyer have described, as well as to depression and anxiety," according to the doctor. (Emphasis added)

Claimant points out that the medical evidence comes from three doctors. Dr. Stephen Fairchild, Claimant's treating physician; Dr. Dermot Killian, a Board-Certified pulmonologist, and Dr. David Bourne, a Board-Certified psychologist. There are significant areas of agreement among the three doctors. They all agree that Claimant has posttraumatic stress disorder as a result of his combat experiences in Vietnam. No one has suggested that his PTSD is work-related. They all accept the fact that working on board ship and being exposed to epoxy caused him to have panic attacks and to experience shortness of breath. They also all agree he should not go back to working on board ship, because he clearly cannot tolerate shipboard conditions, however for different reasons. (EX 20, EX 21)

Claimant submits that the three doctors differ only in their explanation of the mechanism by which shipboard work and exposure to epoxy and other fumes cause his shortness of breath and panic attacks. Dr. Fairchild diagnosed him as suffering from COPD and reactive airways disease. In his view, exposure to epoxy triggered a reactive airways attack, which caused his panic attack. (CX 8; EX 20 at 2; EX 21 at 19)

Dr. Killian found that Claimant was short of breath and had a mild restrictive airways disease. He clearly credited Claimant's reports that epoxy caused him to be short of breath and have a panic attack. Dr. Killian explained that in his view, Claimant became anxious when he encountered epoxy and that triggered a panic attack and caused him to hyperventilate and experience shortness of breath. (EX 20 at 1-2)

Dr. Bourne had a view essentially the same as Dr. Killian's: epoxy triggered fear, which in turn triggered shortness of breath. Dr. Bourne also stated that in his view Claimant's PTSD and anxiety disorder were of longstanding and had remained the same since he left Vietnam. He repeatedly acknowledges that exposures to epoxy at work may be causing a worsening of his shortness of breath, but he does not believe that epoxy caused or aggravated his anxiety. (EX 21 at 17-20)

Neither Dr. Killian nor Dr. Bourne explained why Claimant had worked successfully for almost 30 years before he encountered epoxy on board the ships, but after five years of working in confined spaces around epoxy and other fumes, could no longer work. They do agree that he cannot return to

shipboard work and should not be exposed to epoxy. Dr. Bourne gave a very guarded opinion about his work capacity. He believed Claimant could return to work if he had a part time supportive environment and gradually worked up to full time work in that same environment. (EX 21 at 21)

On the other hand, the Employer submits that it is clear that the claim before me is a claim for a pulmonary condition allegedly caused by exposure to epoxy and other irritants. There is no claim presently before me that Claimant's non work related stress condition is connected to his employment, either by way of cause or aggravation or acceleration.

The Employer's defenses are as follows:

1. The evidence demonstrates that no work-related injury occurred. The Employer concedes that the presumption of compensability is applicable to this claim but asserts that it has rebutted the presumption and that the evidence establishes that the Claimant does not have a work-related reactive airways disease.

2. Any disability Claimant has is due exclusively to non work factors, namely his service-connected post-traumatic stress disorder which was neither caused nor aggravated by employment.

3. Claimant is not temporarily and totally disabled. He has work capacity and the labor market evidence shows that there is a stable labor market for jobs within his capacity.

As noted, Claimant relies upon the medical records of Dr. Stephen Fairchild (EX 14), a family physician, and I note that the doctor has filled out numerous forms indicating, in a conclusory manner, that Claimant's breathing problems are caused or aggravated by exposures at work. There is nothing in the record that would suggest that Dr. Fairchild is a pulmonary specialist, in fact, he clearly thought it was necessary to refer the patient elsewhere for a pulmonary consult. It is also clear from the records that he did not review all of the Claimant's medical records in the case, and his history is inaccurate. For example, with respect to depression, his entry of February 28, 1996 reflects that the patient presented for an initial visit for depression and that symptoms had been present for three months. The onset of symptoms was listed as insidious with no prior treatment. (EX 14 at 83) As will be seen from the review of the Togus Veterans' Hospital records, this was clearly inaccurate. The initial respiratory complaint to Dr. Fairchild was on December 11, 1996. The history was that the patient had been having a hard time breathing the previous two

and one-half weeks. The doctor listed anxiety and prescribed 10 milligrams of Librium. The Claimant told Dr. Fairchild that he became dyspneic when lying down and trying to sleep. Dr. Fairchild stated "... sounds like a panic attack - has no problem when phys. active–-." (**Id.** at 080) On January 24, 1997 Dr. Fairchild's notes reflect that the patient "continued to have difficulty breathing" and that he will "refer for pulmonary consult." (**Id.** at 079) Dr. Fairchild noted that no pathology was found and that he needed to refer him for a pulmonary consult. It is noteworthy that the onset of these complaints was not connected with work, but rather with rest. In January of 1998, the patient was seen for depression and sleep difficulty. (**Id.** at 075)

The records from the Togus Veterans' Medical Center, which are in evidence as EX 15, are very instructive.

On April 10, 1992, the patient presented with a history that he had been in the artillery in Cambodia in 1967 and 1968. Part of the history was "... has had difficulty breathing, that can occur at any time Unknown cause. (EX 15 at 096) It is noteworthy that there is an agent orange stamp on the record.

When admitted to the Togus Veterans' Center on May 24, 2000, the past medical history reads as follows:

> The patient sees primary care doctor, Dr. Fairchild, in Lisbon Falls at Two River Medical Center. He has had chronic obstructive pulmonary disease since 1991. It has been attributed to toxin exposure when he was in the military. He has had panic attacks since 1991 for which his psychiatrist has prescribed Lorazepam and Nefazodone. He has had toxin exposure for which he developed hives, recently acute, and later was diagnosed as having chronic obstructive pulmonary disease. He has no history of ulcers, diabetes, hypertension, or hyperlipidemia. He does have hearing loss. (**Id.** at 113)

In the social history section of that same report, there is a note that the patient had past problems with alcohol and does not use drugs. I note later, it is questionable whether that history was accurate. (**Id.** at 114)

In an entry from February 23, 2000 in the Togus records, the record shows that Claimant was a fifty-one year old male veteran who was very non-compliant with the plans from Dr. Whytes and Dr. Jones. The doctors were trying to taper him from some medications and he was taking extra from his wife's supply. It also appeared that he was drinking and there was speculation as to whether he was minimizing the amounts of alcohol he was

drinking. The doctors recommended that he discontinue alcohol and not take his wife's medication. (**Id.** at 134) I note that at this time the patient was not married but was taking medication from his girl friend, a fact which he acknowledged at the formal hearing. (TR 70, 71; **See also** EX 15 at 135 ['Wants script for Clonazepam says he has been take 1/1 of 1 mg tab in AM and 2 tabs of 1 mg at HS of his wife's script.'])

The Employer also cites other inconsistencies in the Claimant's testimony and in the reports he has given to the doctors over the years at pages 13-17 of its post-hearing brief, and I adopt those reasons to support my conclusions that Claimant is not a credible witness, that he is exaggerating his symptoms for secondary gain, that the opinions of the Employer's medical experts are more well-reasoned and well-documented and that their opinions are entitled to more weight because of their pre-eminent qualifications and status as Board-Certified physicians. These opinions of Dr. Killian and Dr. Bourne have been extensively summarized above and these opinions lead ineluctably to the conclusion that Claimant's reactive airways respiratory problem is a personal illness and is not causally related to his maritime employment as the opinions of Dr. Fairchild, who is not a pulmonary specialist, are far outweighed by the opinions of Dr. Killian and Dr. Bourne and as there simply is no credible or probative evidence that Claimant's reactive airways respiratory problem was aggravated, exacerbated or accelerated by any of the working conditions at the Employer's shipyard. Likewise, there is no credible evidence that Claimant's PTSD was aggravated, accelerated or exacerbated by his shipyard work. Claimant has been diagnosed with that condition since at least 1990, was able to perform all of his shipyard duties until he left the yard because of his personal illness, **i.e.**, the reactive airways respiratory problem, and cannot return to work at the shipyard because of his personal illness.

This Administrative Law Judge, in concluding that Claimant has not sustained a work-related injury, is guided by the most significant decisions of the U.S. Court of Appeals for the First Circuit in **Shorette, supra**, **Harford, supra**, and **Hutchins, supra**, all of which stand for the proposition that the Employer successfully defends against a claim for workers' compensation benefits by introducing substantial evidence severing the connection between the alleged bodily harm and the maritime employment. That Court categorically rejects the former standard requiring the Employer to exclude **ALL** possibilities by presenting a doctor's **UNEQUIVOCAL STATEMENT** totally ruling any and all possible connection between the bodily harm and the maritime employment.

I also note that this claim is strikingly similar to the factual situation presented this Judge in **O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000), wherein the Board reversed an award of benefits to the Claimant as the "**totally ruling out**" standard has recently been rejected by all of the Circuit Courts considering this issue. (I have since denied that claim for benefits on remand from the Board.)

Thus, as Claimant has not established a work-related injury, his claim for benefits must be **DENIED** and I will issue an appropriate **ORDER** to that effect.

However, in the event that reviewing authorities should disagree with this denial, I shall now make alternate findings solely for the future guidance of the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to

obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot now return to work as an electrician. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). As alternate findings, I therefore would find Claimant has a total disability during that time period he was unable to return to work and until the date of the labor market survey.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982),

or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I would find and conclude that Claimant has not reached maximum medical improvement as he would require additional medical care and treatment.

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between

claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains

that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar, the Employer has offered the two volume, September 29, 2000 transferrable skills analysis and labor market survey of Arthur M. Stevens, Jr., CDF, the Employer's Vocational Consultant (EX 16, EX 17), wherein Mr. Stevens, after noting the permanent restrictions of Dr. Fairchild that Claimant is to avoid "fumes, dust and other contaminants that produce shortness of breath, coughing and anxiety," opined that Claimant could work as a front desk/night auditor, a customer service representative, a dispatcher, a sales person, a cashier, a telemarketer, a framing assistant, a limousine driver, a security guard, a stock assistant, a station attendant, an inside sales person, a front desk clerk, an automobile parts driver, a courier, a parking lot attendant, a luggage screener, a counter delivery person, a cashier at a convenience store, a customer service representative, an electronics assistant, a sales associate, a receiver/stocker and as a sales clerk. Mr. Stevens concluded as follows on page 4 of Section A of EX 15 (Emphasis added):

"**In my opinion, a stable labor market does exist in the geographical area if this survey and based upon Mr. Levesque's previous work experiences, education level, physical capacity and the above entry level positions it is reasonable to expect that he could make at least $6.50 per hour and as much as $8.00 per hour to start in an entry level position**" at the numerous prospective employers identified by Mr. Stevens in that section.

Section B details the medical records reviewed by Mr. Stevens. Section C of EX 16 is entitled **Direct Employer Contacts and Employment Status** - a most detailed section

totaling 130 pages - wherein Mr. Stevens lists those employers whom he has contacted, the contact person to whom he spoke, the current job openings, the job qualifications, the physical requirements and, most important, the entry level starting salaries. Section D of EX 16 contains those job leads obtained by Mr. Stevens through newspaper advertisements. These classified "ads" continue in the first section of EX 17. Section E contains Job Service Listings and Section F is an **Addendum** from the Maine Labor Market Digest.

In response to questioning by his attorney, Claimant testified that he has no work experience, dealing with or waiting on the public, or as a sales person or as a telemarketer, or as a hotel/motel front desk clerk or as a cashier in a store. (TR 41-42)

Claimant submits that all the doctors agree that Claimant cannot return to work as an electrician on board ship, his work before the injury occurred, that the Employer has not shown the existence of suitable alternate employment, that it put Claimant out of work because they had no work within his limits, that the Labor Market Survey does not show the existence of suitable alternate employment because it does not consider Claimant's underlying anxiety disorder when evaluating jobs, that it also does not contain any evidence on whether the listed jobs are free of chemical exposures that would violate his limitations, and that the Labor Market Survey does not take into account Dr. Bourne's assessment of Claimant's limited work capacity, namely that he needs a supportive work environment and should return to work part-time, according to the Claimant's thesis.

I disagree because Employer has introduced into evidence as EX 16 and EX 17 a very thorough and detailed labor market survey. It is based upon the work restrictions placed upon Claimant by his treating doctor, Dr. Stephen Fairchild, who is the doctor who took him out of work. The report begins with a summary of the Labor Market Survey and a summary of the records review. Section C contains direct employer contacts and shows that these employers were specifically contacted by telephone or otherwise. Section D shows a review of the newspapers arrows pointing to specific jobs that seem appropriate. Section E shows voluminous listings at the Maine Job Service, all of which represents actual openings. Section F shows the type of sheet that is used indirect employer contact and the status of the Maine labor market and unemployment rates in the areas affected. The bottom line is that this evidence shows voluminous employment opportunities for someone with Claimant's transferable skills and physical restrictions both on a part-time and on a full time basis. There is a map of the State of Maine with a mileage diagram at the beginning of the report that shows that the jobs identified are within easy commuting

distance. The summary establishes the qualifications of Mr. Stevens, who did the labor market survey. It shows that Claimant could earn on a regular basis somewhere between $8.50 an hour and $545.00 per week. There are some jobs that go as high as $35,000.00 per year, which would meet or exceed Claimant's average weekly wage. It is important to note that Claimant's counsel requested the opportunity to depose Mr. Stevens and to have Claimant testify in response to labor market survey and chose to do neither. Thus, as there is no rebuttal evidence to this labor market evidence, the Employer has clearly met its burden under the First Circuit decision in **Air America, Inc. v. Director, OWCP, U.S. Department of Labor**, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979).

As indicated above, the Employer has offered a Labor Market Survey (EX 16 and EX 17) in an attempt to show the availability of work for Claimant in numerous jobs within his restrictions. I accept the results of that very thorough survey which consisted of the counsellor making telephone calls to prospective employers. The report refers to personal contacts with area employers and it is apparent that these job sites were personally visited to observe the working conditions and to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

As noted above, I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age,

education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

In view of the foregoing, I do accept the results of the probative and persuasive Labor Market Survey because again only as alternate findings, I would find and conclude that those jobs constitute, as a matter of fact and law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Once claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to employer to establish the availability of suitable alternative employment which claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner**, **supra**; **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT) (5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beaulah v. Avis Rent-A-Car**, 19 BRBS 131, 133 (1986). Moreover, employer is not actually required to place claimant in alternate employment, and the fact that employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not **bona fide**.

Diamond M Drilling Co. v. Marshall, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

I agree with the Employer that Claimant has not made a good faith to return to work. He should seek employment with a positive attitude by emphasizing the positive aspects of his employment history and the talents he brings to the prospective employer. He should not dwell on any negative aspects, such as his work injuries, his disability or work restrictions. He certainly should not voluntarily disclose those factors and Claimant is reminded that an employer is prohibited from asking those questions, by reasons of the **Americans With Disabilities Act** and the Board has sanctioned the actions of an employee who deliberately misrepresented his disability status because he wanted to return to work. In this regard, **see Hallford v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 112 (1982).

Thus, as the Employer has shown the availability of suitable alternate employment within Claimant's restrictions, the burden now is on Claimant to show that he is ready, willing and able to return to work, just like any other unemployed worker. **See Palombo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991).

Section 14(e)

Claimant would not be entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (EX 13, EX 14) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v.**

Newport News Shipbuilding, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate would be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986);

Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about November 9, 1999 (CX 2) and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Employer, again only as alternate findings, would be responsible for the reasonable, necessary and appropriate medical care and treatment in the diagnosis, evaluation and treatment of Claimant’s COPD, anxiety disorder and depression since October 15, 1999 (CX 8), subject to the provisions of Section 7 of the Act.

ENTITLEMENT

Since Claimant has not established a work-related injury, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to personal, non-work-related conditions he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law

Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993).

As Claimant has not successfully prosecuted this claim, his attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by **Bertrand L. Levesque** shall be, and the same is hereby **DENIED**.

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl